

1995

Accounting v. Murdock : Reply Brief

Utah Court of Appeals

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AUDIT & ACCOUNTING AUTHORITY, LTD.

PLAINTIFF / APPELLEE / COUNTERCLAIM DEFENDANT

DOCKET No. 950409-CA
A10

vs.

BILLIE MURDOCK

DEFENDANT / APPELLANT / COUNTERCLAIM PLAINTIFF

In the Utah Court of Appeals

DOCKET No. 950409-CA

APPELLANT'S REPLY BRIEF

ON APPEAL FROM A FINAL JUDGMENT
BEFORE THE THIRD CIRCUIT COURT FOR UTAH
SALT LAKE COUNTY, SANDY DEPARTMENT
JUDGE: HON. ROGER A. LIVINGSTON

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CORRECTIONS TO TECHNICAL ERRORS IN APPEAL BRIEF

STATEMENT OF REASONS FOR CORRECTIONS:

In its answer brief to this appeal, appellee Audit & Accounting Authority, Ltd. ("Audit"), argued that appellant, Billie Murdock ("Murdock"), failed to include citations to the record in her statement of the issues and statement of facts. Murdock, recognizing this inadvertency, subsequently sought leave of Court to correct these technical errors and to include such corrections in this her reply brief. By date of 2 August 1996, this Court issued its Order granting Murdock's motion in this regard.¹ Accordingly, those corrections are set forth respectively as follows:

¹ A copy of that Order is annexed hereto at Tab 1.

RECORD CITATIONS PERTAINING TO THE STATEMENT OF THE ISSUES

ISSUE NO. 1: Did the circuit court err by restricting the time for trial and thereby deprive Defendant of fundamental due process under section one of the fourteenth amendment to the U. S. Constitution, and Article I, section 7, of the Constitution of the State of Utah?

See Pretrial Transcript ("P.T."), dated 10 December 1993, page 5, lines 10-12; p. 13, lines 12-13; and p. 15, lines 13-20 (Record Index ["R.Idx."] 244. 261 [originally 304. 321], wherein the court below deemed appropriate a half-day trial setting. See also P.T., dated 28 October 1994, page 3, lines 14-20; p. 5, lines 13-16; p. 6, lines 19-20; and p. 7, lines 2-4 (R.Idx., 262. 269 [originally 322. 329], wherein the court continued this line of reasoning. This issue arose from the fact that the court, only on the day of trial, telephonically communicated that it was arbitrarily restricting the time for trial to one hour notwithstanding its prior statements on the record to the contrary during the preceding year upon which Defendant had relied.

ISSUE NO. 2: Did the circuit court err in granting judgment to Plaintiff where Defendant had previously raised, in her amended Answer pleadings pursuant to Rule 8(c), U.R.C.P., the affirmative defense that Plaintiff's claims were stale and thus barred by the doctrine of waiver, laches, and estoppel?

See Defendant's Amended Answer and Counterclaim (Second), "Seventh Affirmative Defense," page 5 (R.Idx., 68. 103 [originally 125. 160]). See also, Reporter's Trial Transcript ("R.T."), page 64, lines 21-25; page 72, lines 20-25; p. 73, lines 10-12; p. 74, lines 14-17; and pp. 77-78, lines 25, 1, respectively (R.Idx., 270. 372 [originally 330. 431]).

ISSUE NO. 3: Did the circuit court err by denying Defendant equal protection under the law where it awarded assignee Plaintiff the benefit of interest pursuant to Assignor's contract while precluding Defendant from calculating like interest amounts pursuant to her unambiguous contract upon which Assignor had previously defaulted in order to obtain an equal, or greater, offset against assignee Plaintiff's claims as provided pursuant to Rule 13(c), U.R.C.P.?

See R.T., p. 76, line 22, and R.T., pp. 78-79, lines 9-25 and 1-3, respectively (R.Idx., *Ibid.*).

ISSUE NO. 4: Did the circuit court err in granting judgment to Plaintiff where it calculated Plaintiff's claims by relying on defense exhibit incorporating Assignor's unproven amounts in light of finding that Plaintiff's case suffered from lack of adequate evidence in the record?

See R.T., p. 73, line 5 through p. 78, line 8 (R.Idx., *Id.*).

ISSUE NO. 5: Did the circuit court err by finding that Defendant had failed to prove "by a preponderance of the evidence," that she had a cause of action pursuant to the FDCPA and the UCSPA where she was precluded from prosecuting her claims thereunder as the proximate result of the time restraints imposed for trial?

See R.T., p. 85, lines 17-25 and p. 86, lines 1-25; R.T., p. 99, lines 12-16 (R.Idx., *Id.*).

RECORD CITATIONS PERTAINING TO THE STATEMENT OF FACTS

STATEMENT OF THE FACTS

The facts set forth in Part A of this appeal deal solely with matters regarding the claims in Plaintiff's complaint and Defendant's defenses and counterclaims thereto. Part B hereof deals with the subject matter of Defendant's counterclaim which seeks relief for Plaintiff's alleged violations of the FDCPA which, in turn, give rise to additional pendent claims under the UCSPA. (See R.Idx., 1. 2. and 16. 39. [originally 12. 35.], respectively, which was subsequently amended as set forth below.) Although the claims under both Part A and Part B necessarily arise from the same disputed transactions, the two Parts bear no logical relationship to each other.² With respect to Part A, the facts date from Assignor's default on Defendant's Contract for postage and mailing equipment, executed 31 March 1982, and subsequent events related thereto. (See 4-page Exhibit incorporated

² See footnote #1 at p. 3 of Murdock's appeal brief citing appropriate authority in support of this statement.

in Murdock's appeal brief entitled "Sales Agreement," "Delivery Receipt," etc., about which she testified and ultimately prevailed upon at trial wherein the court below awarded her a principal-only amount in offset [See R.T., p. 10, lines 12-15; R.T., pp. 76-77, lines 21-25 and 1, respectively], yet disallowed admission of these very same documents into evidence thereby effectively precluding any award of offsetting interest.) These events eventually culminated in Assignor's assigning to Plaintiff the alleged debt purported to be owed by Defendant and ultimately resulted in the instant litigation now on appeal here. (See R.T., p. 22, lines 5-8; 17-19 [R.Idx., *Id.*]) With respect to Part B, the facts stem from Plaintiff's initial communication to Defendant, dated 8 May 1991, as a third-party debt collector, (See Defendant's Exhibit A of her Amended Answer and Counterclaim [Second] R.Idx., 68. 103 [originally 125. 160], and events transpiring thereafter, all of which Defendant alleges violated the FDCPA and give rise to the additional protections afforded pursuant to the UCSPA. This appeal raises five (5) principal issues for review by this Court. The first issue relates to both Part A and Part B. Issues #2 through #4, inclusive, relate to Part A only, while Issue #5 relates solely to Part B.

ARGUMENT IN REPLY

POINT I: Having complied herein consistent with this Court's Order of 2 August 1996, referenced above, the first point argued in Audit's answer brief is thus rendered moot and no further reply is necessary.

POINT II: Here, Audit's argument, while technically correct in the strict legal sense, is largely inapplicable under the facts of this case owing to the uncertainty of whether, at any given point during trial, the court had deemed the case concluded, or whether

further proceedings were going to be entertained. Owing to this uncertainty, it was simply not possible to determine the court's intentions in this regard ahead of time and it would have been untimely to object to the arbitrary shortening of the time for trial if, in fact, sufficient time to fully argue the issues were going to be made available after all.³

This uncertainty is made further evident where, at one point during trial while the parties and the court were discussing the payments made by Murdock to Audit's Assignor, the court began to make what appeared at the outset to be a clarifying statement in that regard, but concluded in a ruling instead, (See generally, R.T., beginning at p. 71, line 12, through p. 74, line 10), which ultimately resulted in the pronouncement of final judgment. (See R.T., p. 78, lines 3-9.) Yet, after bidding all present "...[a] very happy holiday season" in seeming conclusion, whereupon Murdock reminded the court of her counterclaim under the FDCPA, the court then conceded to grant a limited hearing of the issue which is made evident by its preemptory request that Murdock "...[j]ust give me a Reader's Digest -- what do you believe -- what is the conduct that violated the --." (R.T., p. 86, lines 17-19.)

Even so, however, upon Murdock's attempt to comply with the court's express request for a "Reader's Digest" version of Audit's conduct that is alleged to have violated the provisions of the FDCPA, the court, in fact, cut off that very attempt at explanation in mid-sentence at the outset by stating "...[I]'ve got your counterclaim and exhibits." (R.T., p. 86, lines 24-25). Thus, it continued to remain unclear whether the court was going to allow the time necessary for Murdock to fully prosecute her counterclaim under

³ In this regard, see, for example, R.T., p. 34, lines 21-22: "I'm going to give you five more minutes to get moving on this trial." But see, R.T., p. 54, lines 5-6: "Okay. I wanted to -- in case we don't finish this today, which I doubt we are."

the FDCPA, as duly contemplated by that federal statute, thereby precluding, once again, the wisdom of objecting to the shortening of time at this point as well where it had not yet become an established fact.

Repeated further attempts by Murdock to provide the requested "condensed version" of the claims set forth in her counterclaim were only met with continued interruptions by the court.⁴ Such actions by the court constituted a complete reversal of its prior ruling near the outset of trial proceedings. At that point, where the court was deciding the merits of the motion in limine put forth by Audit, the court ruled, in pertinent part, as follows:

"Certainly I'm not going to forgo (sic) Mr. Stanton [Murdock] from asserting as a defense, or offset the claims even though they may not be -- even if they could not be asserted as a separate action. ..." (R.T., p. 10, lines 12-15.)

Thus, the court's later actions during trial clearly operated in diametric opposition to this prior ruling which ultimately served to preclude Murdock from fully asserting her defenses and prosecuting her counterclaims under the FDCPA as the direct and proximate result of the uncertain, often interrupted, and hurried nature of the trial, which is abundantly evident throughout the entirety of the abbreviated trial proceedings and duly reflected in the record.

To the extent the foregoing facts, and actions of the court, bear weight in mitigation of Murdock's inadvertent failure to expressly object, on the record, to the shortening of time for trial owing largely to such circumstances, thus remains for this Court to determine. However, the Court, in its discretion, may decide a case upon any

⁴ The facts pertaining to this issue are discussed more fully in Point VI hereinafter.

points that its proper disposition may require, even if first raised in a reply brief. Romrell v. Zion's First National Bank, N. A., 611 P.2d 392, 395 (Utah, 1980), citing Bardeen v. Commander Oil Co., 48 Cal.App.2d 355, 119 P.2d 967 (1941).

As this issue presents several questions of fundamental due process arising under both the Federal and State Constitutions, as amply reflected in the record, it is likewise well-settled that appellate courts have the ultimate power to conduct an independent review of federal constitutional claims. City of St. George v. Turner, 860 P.2d 929, 932 (Utah, 1993), citing Miller v. California, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). Those constitutional guarantees should not be subverted or diminished by the *inadvertent* failure of any party to strictly comply with tenets of pure legal technicality, such as mere failure to object on the record to the shortening of time for trial -- particularly where the constitutional aspects of such shortening of time only became apparent after the trial had ultimately concluded.

POINT III: Here, Audit argues: "There is no citation to the record of any place where the words waiver, laches, or estoppel appear except to mention the amended answer," and cites a 1991 decision of this Court in support of that contention. This Court, however, later addressed more precisely the point Audit here argues where, in a contract action like this one, it was subsequently determined that it is the actions of the parties, as found by the trial court, rather than specific use of the words, which controls in whether these requirements are met. In Pasker, Gould, Ames & Weaver v. Morse, 887 P.2d 872, 876 (Ut.Ct.App., 1994), this Court held as follows:

"...[W]hile the trial court did not specifically use the word "waiver," the actions of the parties -- as found by the trial court -- meet the requirements for waiver."

This Court then went on to explain just what constitutes the elements necessary to constitute waiver and held that in order to so determine, the court looks at the totality of the circumstances involved. *Id.*, at 876.

Applying this same rationale to the instant case on appeal, it is equally clear that the actions of the parties, particularly the actions of Audit's Assignor, as found by the court, likewise meet the essential elements necessary to meet the requirements for laches. Further, it cannot be doubted that the elements necessary to constitute laches were thus raised to a level of consciousness of the court where the court itself discussed those very elements in its findings (R.T., p. 72, lines 1-14), even though the word "laches" was not specifically mentioned, and particularly in light of the fact that both Audit and Murdock had previously testified (R.T., p. 32, lines 20-24, and p. 42, line 25, respectively), with Audit further stipulating (R.T., p. 33, lines 9-10), that the events and circumstances in the case at hand originated some 12 years earlier, or nearly a decade prior to Assignor's instant assignment of its alleged claims to Audit. This issue is argued more fully in Issue #2 of her appeal brief.

Because Murdock properly claimed the affirmative defense of laches in her amended answer, as Audit here points out, and where the court had previously ruled that it was not going to forego the assertion of her claims as a defense, and where the court further found the essential elements present which constitute the requirements for laches, even though that word was not specifically mentioned, Murdock duly met her obligation to preserve this issue on appeal with or without further request. Considered in light of the totality of these circumstances the trial court erred in granting judgment and Audit's action should be held barred as the doctrine of laches commands. The

judgment should be reversed and vacated on those grounds.

POINT IV: Audit's argument here, addressing the issue surrounding Murdock's 1982 contract upon which Audit's Assignor had originally defaulted, asserting that: "Appellant has not established a right to offset the judgment with interest allegedly due to defendant," and claiming that a ruling to that effect was not obtained during trial, is unfounded where Audit overlooks, again, the fact of the court's prior ruling, indicated above. (R.T., p. 10, lines 12-15 *Ibid.*).⁵ Audit also overlooks the fact of Murdock's testimony at trial concerning such contract and the court's acknowledgment of it at that time. (R.T., pp. 42-43, lines 5-25, 1-2, respectively; p. 53, lines 15-18.) That acknowledgment was further established where Murdock was awarded a principal-only amount therefor in offset against Audit's claims.

Audit also argues in this point concerning an evidentiary ruling at a side bar conference and cites a case in support of that proposition claiming "that case is controlling here," alleging that no ruling to that effect (the admissibility of Murdock's contract) appears on the record. This is simply not true and the record, in fact, indicates to the contrary where every other document submitted and/or testified to by Murdock at trial was subsequently admitted into evidence *except* for her contract. Thus it cannot logically be argued or even assumed that the issue was waived. It likewise cannot be doubted that Murdock argued for admission of her chief piece of evidence, or in the alternative, if the same were not admitted that no interest be awarded under Assignor's contract as well, where the court summarized thereafter, on the record, the substance of

⁵ *See ante*, page 3 herein.

the sidebar discussions ⁶ and the reasoning behind its ruling in that respect.

Audit concludes this point by stating: "Not having claimed the offset in the pleadings and having failed to offer the contract into evidence on the record or to obtain a ruling on the record, Defendant can not claim the evidence was improperly excluded."

Having just argued in reply to the latter part of this statement, only the first part merits further discussion. By Audit's statement: "Not having claimed the offset in the pleadings,..." it again ignores the fact of the court's prior ruling to the contrary which, in fact, entitled Murdock to offset against Audit's claims. Audit's statement in this regard cannot be read to exclude relevant evidence (*i.e.*, her contract with Audit's Assignor), which was subsequently discovered only many months after Murdock's amended answer and counterclaim had been drafted and filed; in fact, nearly a year after.⁷ Nevertheless, a copy of the same was timely provided to Audit with her witness and documents list required to be exchanged by the parties prior to trial as ordered by the court. As this evidence was duly presented, testified to, and considered by the court at trial, as both the record and the judgment plainly reflect, it was plain error for the court below to subsequently exclude its admission as evidence; the same constituting an abuse of discretion, the error not being harmless.

Thus, where the court erred by improperly excluding the admission of Murdock's

⁶ For quotations by the court and citations to the record on this point, see indented paragraphs appearing on pp. 25-25 of Murdock's appeal brief. (R.T., pp. 78-78, lines 9-25 and 1-13, respectively. *Ibid.*)

⁷ To eventually discover the original contract required an extensive search through more than a dozen years' accumulation of business and personal records. Not having this evidence in hand at the time the pleadings were drafted, nor any assurance that it could ever be located at this late date, necessarily precluded its inclusion.

contract from evidence, Audit's concluding statement in this point succinctly identifies the very heart of this issue on appeal: "Without that evidence, there [was] no basis for the trial court to assess interest on the contract. On that basis, no offset could be allowed." Accordingly, to the extent the court's award on Murdock's excluded contract of a principal-only amount in offset against Audit's claims constituted an "interpretation" as a matter of law without regard for extrinsic evidence, the court's interpretation should be afforded no particular weight on appeal. Seashores, Inc. v. Hancey, 738 P.2d 645, 647 (Ut.Ct.App., 1987).

POINT V: In this point, Audit largely postulates its own theories as to what constitutes the appropriate standard of review applicable to Issue #4 in Murdock's appeal brief, presupposing the same to be one of finding of fact when, in actuality, the question presents a conclusion of law as to whether Audit failed to prove its prima facie case, Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1144 (Ut.Ct.App., 1994); Handy v. Union Pac. R. R., 841 P.2d 1210, 1215 (Ut.Ct.App., 1992), and is therefore reviewable by this Court for correction of the trial court's conclusions and calculations. Wade v. Stangl, 869 P.2d 9, 12 (Ut.Ct.App., 1994); McMahan v. Dees, 873 P.2d 1172, 1175 (Ut.Ct.App., 1994).

In any lawsuit, the burden of proof is incumbent upon the plaintiff. In the instant case, the record reflects that Audit received assignment of Assignor's claim on 25 April 1991. (R.T., p. 22, lines 20-21.) Audit filed suit dated 27 July 1992 and the complaint alleged "...[t]he amount due as of November 4, 1991 is the sum of \$3,976.74." (R.Idx., p. 1, para. 3.) At the end of Part A of the trial the court concluded the final judgment to be \$528.00, plus interest. Thus, Audit clearly failed to prove its prima facie

case even though it was the prevailing party.

Because Audit's failure to carry this burden was largely overcome solely by the court's conclusion (*i.e.*, to accept the "highest gross amount" it could find anywhere in the documents submitted by either party during the past decade [*i.e.*, \$5,328.00] as a valid beginning point upon which to base its calculations in arriving at the final judgment amount of \$528.00) rather than by proving its own *prima facie* case; and, where the court adopted findings of fact and conclusions of law which incorporated a theoretical example only of interest calculations ultimately prepared and submitted by Murdock at the court's post-trial invitation to do so which stemmed from her objections to Audit's prior proposed interest calculations; and, where the court improperly excluded Murdock's contract from evidence thus precluding the calculation of interest amounts in offset, the court's conclusions and calculations should be reviewed for correctness.

POINT VI: In this point, Audit argues: "Defendant's failure to prove her counterclaim is adequately supported by the record." In support of that argument, Audit further states: "...[t]he record contains several incidences of the trial court inviting the Defendant to offer more evidence or argument on her counterclaim," then merely cites a few of the examples argued in Issue #5 of Murdock's appeal brief in order to assert an opposite conclusion to those set out by her.

As this issue is fully argued in her brief, no further response in that regard is necessary in this reply brief. However, it is important to point out here some matters of equal relevance with respect to this issue. As Audit is a collection agency, *per se*, it is an entity governed by both federal and state statutes and implementing regulations, and the courts are bound to take judicial notice thereof. Accordingly, to the extent the

trial court's findings as to the issues presented under the FDCPA constituted an interpretation of the same, those findings and interpretations present a question of law which are properly reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah, 1993) (whether trial court correctly interprets statute is question of law to be reviewed for correctness).

In Issue #5 of her appeal brief, Murdock cites several instances on the record which clearly constitute an interpretation by the court of the provisions of the FDCPA. In addition, she also clearly identifies how the actions of Audit inflicted against her during the pendency of this action constitute express violations of the FDCPA where similar issues have been decided by numerous federal and state appellate courts. As Congress clearly intended to make an aggrieved consumer, such as Murdock in this case, the primary self-enforcement mechanism under the provisions of the FDCPA, she is plainly entitled to the protections afforded thereby as well as to those contained in the UCSPA as contemplated by that federal statute.

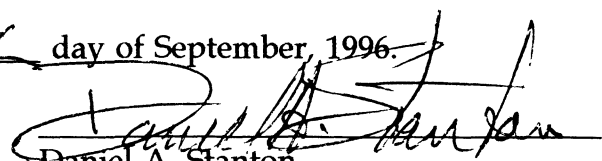
For, as the Utah Supreme Court has said:

"Legal determinations are defined as 'those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances'." State v. Pena, 869 P.2d 932, 935 (Utah, 1994).

CONCLUSION

For the reasons set forth herein, the judgment of the court below should be reversed and vacated.

RESPECTFULLY SUBMITTED this 2 day of September, 1996.


Daniel A. Stanton
Attorney for Appellant

FILED
Utah Court of Appeals
AUG 02 1996
Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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Audit & Accounting Authority)
Ltd., a Utah corporation,)
)
 Plaintiff and Appellee,)
)
v.)
)
Billie Murdock,)
)
 Defendant and Appellant.)

ORDER
Case No. 950409-CA

This matter is before the court upon appellant's motion, filed July 11, 1996, for permission to correct a technical error in her brief. Appellee did not object or otherwise respond to the motion.

IT IS HEREBY ORDERED that the motion is granted, with appellant to include the correction in appellant's reply brief. IT IS FURTHER ORDERED that appellant's reply brief shall be filed within thirty (30) days of the date of this order.

Dated this 2nd day of August, 1996.

FOR THE COURT:



Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on August 2, 1996, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Daniel A. Stanton
Aron Stanton, P.C.
Attorney at Law for Appellant
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John G. Mulliner
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363 No. University Avenue, Suite #103
P.O. Box 1045
Provo, UT 84603

Dated this 2nd day of August, 1996.

By *Timothy Hays*
Deputy Clerk

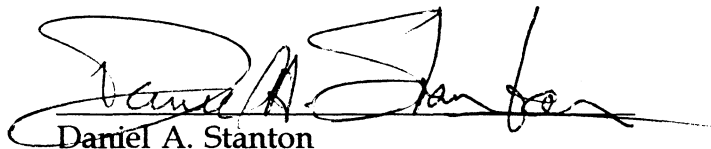
Case No. 950409-CA

CERTIFICATE OF SERVICE

I hereby certify that this day I caused to be delivered to the Clerk of the Court of Appeals an original hereof together with seven (7) true and correct copies, and that I mailed this day two (2) copies hereof, true and correct, to Plaintiff's counsel, first-class postage prepaid, and addressed as follows:

John G. Mulliner
363 N. University Ave., Suite 103
P. O. Box 1045
Provo, Utah 84603

DATED this 3 day of September, 1996.



Daniel A. Stanton